

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FS:MAN:2:TL-N-4258-01

Akozoulina

date: **AUG 28 2001**

to: Robert C. Skiba, Territory Manager, Financial Services
Attn: Revenue Agent Antoinette Naoum

from: Area Counsel
(Financial Services; Area 1)

subject: Consent to Extend the Statute of Limitations on Assessment for Tax
Year ending December 31, [REDACTED]
Taxpayer: [REDACTED]
EIN: [REDACTED]
Years: [REDACTED]
U.I.L. Nos. 6501.08-10, 6501.08-12
Statute of Limitations Expires: [REDACTED]

This memorandum responds to your request for assistance dated July 9, 2001. This memorandum should not be cited as precedent. Specifically, you have asked our office to provide the appropriate language to be used on a Form 872, Consent to Extend the Statute of Limitations on Assessment, for [REDACTED] (" [REDACTED] ") for the taxable year [REDACTED].

Issues

1. Whether [REDACTED]'s parent, [REDACTED], formerly known as [REDACTED] (" [REDACTED] "), which received all the remaining liabilities and assets of [REDACTED] pursuant to the Assignment and Assumption Agreement, has the authority to execute Form 872 with respect to the tax liability of [REDACTED] as a successor of [REDACTED]'s interest.

2. Whether [REDACTED], a bank chartered by the State of New York which was dissolved in [REDACTED] pursuant to a dissolution order of the state court, has the authority to execute Form 872, Consent to Extend the Statute of Limitations on Assessment, for the taxable year [REDACTED].

3. Whether [REDACTED], as a transferee of [REDACTED]'s assets under § 6901, has also the authority to execute Form 977, Consent to Extend Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax against a Transferee or Fiduciary, and Form 2045, Transferee Agreement.

4. Who should sign the above forms on behalf of [REDACTED] and [REDACTED]?

Conclusions

1. [REDACTED]'s parent, [REDACTED], formerly known as [REDACTED] has the authority to execute the Form 872, Consent to Extend the Statute of Limitations on Assessment, as a successor in interest of [REDACTED] under the Assignment and Assumption Agreement.

2. [REDACTED], the New York State chartered bank which was dissolved in [REDACTED] pursuant to the order of dissolution of the state court, still has the authority to execute Form 872, because a valid Power of Attorney in the name of [REDACTED] was issued pursuant to the authorization of [REDACTED], the sole shareholder of [REDACTED] and successor of [REDACTED]'s interest.

3. [REDACTED]'s parent, [REDACTED], formerly known as [REDACTED] also has the authority to execute Form 2045, Transferee Agreement, and Form 977, Consent to Extend Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax against a Transferee or Fiduciary, as a transferee of [REDACTED]'s remaining assets under the Assignment and Assumption Agreement.

4. A representative of [REDACTED] under Form 2848, Power of Attorney and Declaration of Representative, should sign Form 872 on behalf of [REDACTED] Deputy General Manager, [REDACTED], should sign Forms 872, 977 and 2045 on behalf of [REDACTED].

Background

This opinion is based upon the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon.

You should be aware that, under routing procedures which have been established for opinions of this type, our prior memorandum dated August 17, 2001, was referred to the National Office of Chief Counsel for review. The Office of Chief Counsel reviewed and agreed with the conclusions reached in the August 17, 2001 memorandum. They did, however, propose the following additional comment with respect to the last issue in the August 17, 2001 memorandum: only a representative under Form 2848, Power of Attorney and Declaration of Representative, should sign Form 872 on behalf of [REDACTED], (b)(5)(DP), (b)(7)a [REDACTED], (b)(5)(DP), (b)(7)a [REDACTED]

, (b)(5)(DP), (b)(7)a [REDACTED] Therefore, pursuant to a valid Power of Attorney, [REDACTED] is the proper party to sign Form 872 on behalf of [REDACTED]

Facts

[REDACTED] (E.I.N. [REDACTED]) was incorporated in [REDACTED] in New York state. It was a wholly owned subsidiary of [REDACTED] (E.I.N. [REDACTED]), a foreign banking corporation with branches in the U.S. [REDACTED] filed Form 1120, U.S. Income Tax Return, and was never a member of a consolidated group. [REDACTED] for the taxable year [REDACTED] to the present, files Forms 1120-F, U.S. Income Tax Return of a Foreign Corporation.

[REDACTED] timely filed [REDACTED] and [REDACTED] federal income tax returns. Currently, the returns for the taxable years [REDACTED] and [REDACTED] are under examination. In [REDACTED] [REDACTED] filed Form 1139, Corporation Application for Tentative Refund, reflecting the carry back of its [REDACTED] net operating loss ("NOL") to the years [REDACTED] and [REDACTED], and also Forms 1120X, Amended U.S. Corporation Income Tax Return for [REDACTED], [REDACTED], and [REDACTED]. Therefore, the taxable year [REDACTED] became relevant to the pending examination. The statute of limitations for assessment for [REDACTED] expires on [REDACTED]. Therefore, an extension of the limitation period has been sought for [REDACTED].

[REDACTED] was an insured depository institution chartered by the State of New York on [REDACTED] and subject to the regulations of and supervision by the New York State Banking Department and the FDIC. [REDACTED]'s principal activities were composed of wholesale banking and trust services to corporate customers.

[REDACTED] was supervised by the parent, [REDACTED], through the [REDACTED] ("Branch"), the parent's branch in the U.S. Namely, [REDACTED] operated under a joint agreement with the Branch, which specified the types and terms of business activities that are entered into between [REDACTED] and the Branch.

In [REDACTED], [REDACTED] was liquidated. This liquidation was triggered by the following events:

1) in [REDACTED] the parent of [REDACTED] [REDACTED] was

[REDACTED] and

2) the [REDACTED] restructured the bank operations of [REDACTED] and liquidated some of its assets, including [REDACTED]

The Plan of Liquidation of [REDACTED] was adopted by the Board of Directors at its regular meeting held on [REDACTED] and by the sole shareholder at a special meeting held on [REDACTED].

In compliance with the voluntary dissolution provisions of Section 605 of the Banking Law of New York, [REDACTED]

1) timely filed Form 966, Corporate Dissolution or Liquidation, on [REDACTED] with the Service Center in [REDACTED] NY;

2) applied to the Superintendent of Banks of the State of New York for approval of the transfer of deposit liabilities and related assets of [REDACTED] to the [REDACTED] under § 601-a of the Banking Law of New York, on [REDACTED]

3) petitioned the Supreme Court of the State of New York for an order declaring that the business of [REDACTED] be closed (a "closing order") on [REDACTED] and

4) notified the Superintendent of Banks of the State of New York about the voluntary dissolution on [REDACTED]

[REDACTED] obtained the closing order dated [REDACTED] setting forth procedures for [REDACTED] to comply with in order to return to the court to apply for a dissolution order. On [REDACTED] the dissolution order of the Supreme Court of New York was entered. The dissolution order effectively signified that the winding up of the company's business was completed and the corporate existence of [REDACTED] was terminated.

On [REDACTED] [REDACTED] entered into an Assignment and Assumption Agreement with [REDACTED] to become effective on the date of the dissolution order. Under this agreement, [REDACTED] assigned its remaining assets to [REDACTED] and [REDACTED] assumed the remaining liabilities of [REDACTED].

After the dissolution of [REDACTED] [REDACTED] continued its presence in the U.S. through its Branch. In [REDACTED] the [REDACTED] sold [REDACTED] to a consortium of international investors, retaining a certain equity interest in the bank. On [REDACTED] [REDACTED] changed its name to [REDACTED]. We verified that [REDACTED] retained the same E.I.N. as [REDACTED], namely E.I.N. [REDACTED]. The business address of the U.S. Branch of [REDACTED] is [REDACTED].

Subsequent to the dissolution of [REDACTED] but before the change of its name, [REDACTED] authorized [REDACTED] former Executive Vice President of [REDACTED], who had previously signed [REDACTED]'s tax returns for the [REDACTED], [REDACTED], and [REDACTED] tax years, to sign amended tax returns for taxable years [REDACTED] and [REDACTED] for [REDACTED] and Form 2848, Power of Appointment and Declaration of Representative. During [REDACTED], [REDACTED] signed amended returns, and on [REDACTED] [REDACTED] signed Form 2848 appointing [REDACTED]

██████████, ██████████, and ██████████ of ██████████ as representatives of ██████████ with regard to federal income tax returns for ██████████, ██████████, and ██████████.

Discussion

Issue 1:

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. For income taxes, the form used by the Service to extend the limitations period on assessment is Form 872, Consent to Extend the time to Assess Tax.

██████████ should generally be the proper party to sign the consent to extend the statute of limitations on assessment for its taxable year ██████████. However, ██████████ was dissolved in ██████████ pursuant to the dissolution order of the Supreme Court of the State of New York which terminated its existence for all purposes under Section 605 of the Banking Law in New York.

Before the dissolution, ██████████ transferred all its remaining assets and liabilities to its parent, ██████████ (formerly known as ██████████) pursuant to the Assignment and Assumption Agreement. According to the provisions of this Agreement, ██████████ contractually assumed the liabilities of ██████████ and became its successor in interest:

"The Bank agrees, upon the occurrence of the effective date, to assume and undertake to discharge, perform and pay to the extent not discharged, performed or paid by the Trust Company, all of the debts, liabilities and obligations of the Trust Company of every kind, character and description (including, without limitation, liabilities for or in respect of pending of future litigation) whether existing on and incurred prior to the date of dissolution of the Trust Company or arising out of transactions or events occurring after such date, and whether or not asserted before, including, without limitation, the following:

(a) claims, demands, and causes of action of whatever kind and nature that are pending or

might in the future be brought against the Trust Company; and

(b) taxes, imposts and duties, and liabilities and obligations in respect thereof, heretofore or hereafter incurred by the Trust Company."

As a successor in interest to [REDACTED] [REDACTED] has the authority to execute Form 872.

Accordingly, Form 872 should be captioned as follows:

"[REDACTED] (E.I.N. [REDACTED], formerly known as [REDACTED] (E.I.N. [REDACTED], as successor in interest to [REDACTED] (E.I.N. [REDACTED]."

Issue 2:

The second issue presented is whether anyone has the authority to sign Form 872 on behalf of [REDACTED] in its own name given that it dissolved and ceased to exist in [REDACTED]. The related issue is whether the Form 2848, Power of Attorney and Declaration of Representative, signed on [REDACTED] by the former officer of [REDACTED] is valid.

Under Section 605 of the Banking Law in New York State, the dissolution order of the state court completes the winding-up period and terminates the existence of the entity. It would seem then that a former officer of [REDACTED] would not have an authority to sign Form 2848 after the court order dissolving [REDACTED] was entered. However, [REDACTED] (formerly known as [REDACTED], as a sole shareholder and successor in interest of [REDACTED] expressly authorized [REDACTED] to sign Form 2848, confirming such fact in a letter dated [REDACTED]. Therefore, based on such express authority given by the sole shareholder and successor in interest of [REDACTED], we believe the power of attorney is valid.

Generally, a representative authorized to handle federal tax matters is also authorized to execute an extension of limitations period unless the authority is so specific as to imply limitations. See, Elrod Slug Casting Mach. Co. v. O'Malley, 57 F. Supp. 915 (D Neb., 1944). [REDACTED] granted their representatives an authority to handle federal tax matters related to Form 1120 for [REDACTED], [REDACTED], and [REDACTED], which generally includes the authority to sign extensions.

Therefore, in order to secure the interests of the Service, we

recommend that you obtain a second Form 872, which should be signed by the Power of Attorney. It should be captioned as follows:

" [REDACTED] (E.I.N. [REDACTED]) ."

Issue 3:

[REDACTED] is also a transferee of [REDACTED]'s assets within the meaning of I.R.C. § 6901 under the Assignment and Assumption Agreement. I.R.C. Section 6901(a) provides a procedure through which the Service may collect from a transferee of assets unpaid taxes owed by the transferor of the assets if a basis exists under applicable state law or equity for holding the transferee liable. Hagaman v. Commissioner, 100 T.C. 180, 183 (1993). In our case, a transferee's liability was assumed by [REDACTED] contractually. See, Southern Pacific Transportation Company v. Commissioner, 84 T.C. 367 (1985). Such contractual transferee's liability may be applicable to both domestic and foreign corporations.

Although under I.R.C. § 6901(c), the statute of limitations on assessment of [REDACTED] as a transferee is open until [REDACTED], which is 1 year after the end of the three-year statute of limitations on assessment applicable to [REDACTED], it is advisable to establish the transferee status of [REDACTED] presently.

To establish the transferee status, and extend the statute of limitations on assessment as a transferee, [REDACTED] should sign both Form 2045, Transferee Agreement, and Form 977, Consent to Extend Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax against a Transferee or Fiduciary. See, IRM 121.2, Ch. 22.6.16.1. Please note that under the case law, the execution of Form 2045 is not sufficient by itself since it merely provides evidence of transferee liability. See, Southern Pacific Transportation, 374 n.6 (1985).

Form 977 and Form 2045 should be captioned as follows:

" [REDACTED] (E.I.N. [REDACTED]), formerly known as [REDACTED] (E.I.N. [REDACTED]), as transferee of [REDACTED] (E.I.N. [REDACTED]). This is with respect to the tax liability of [REDACTED] (E.I.N. [REDACTED]) for the tax year ended December 31, [REDACTED]."

Issue 4:

Neither I.R.C. § 6501(c)(4) nor the regulations thereunder specifies who may sign consents to extend the statute of limitations on assessment. The Service therefore applies the rules

applicable to the execution of the original returns to the execution of Forms 872. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

Under § 6061, any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. In the case of corporate returns, Section 6062 and Treas. Reg. 1.6062-1 provide that a corporation's income tax return shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of the corporation.

Therefore, any such officer of [REDACTED] is authorized to sign Form 872, Form 977, and Form 2045. The best person to sign on behalf of [REDACTED] may be [REDACTED] Deputy General Manager, who signed the letter dated [REDACTED] confirming the fact that [REDACTED] was authorized by [REDACTED] (currently [REDACTED]) to sign Form 2848. This assumes that [REDACTED] holds one of the above referenced positions specified in § 6062 and Treas. Reg. 1.6062-1.

With respect to the Form 872 on behalf of [REDACTED] any representative under Form 2848 Power of Attorney and Declaration of Representative, may sign it.

With respect to who can execute the consent forms for the Service, your Director of Field Operations (DFO) is authorized to execute them. Although the current forms indicate that the District Director should sign them, those forms do not reflect the Service's recent reorganization. Thus, you should replace the District Director title with "Director, Field Operations." You should verify whether the Director's authority to sign consents has been re-delegated to the territory managers and then secure that manager's signature in lieu of the DFO.

PROCEDURAL CONSIDERATIONS

As a final matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual ("IRM"). Specifically, IRM 121.2, Ch. 22, requires the use of Letter 907(DO) to solicit the extension, and IRM 121.2, Ch. 22.4.2 requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 121.2, Ch. 22. The manager must also update the statute of limitations in the continuous case management statute control file and properly

annotate Form 895 or equivalent. See, IRM 121.2, Ch. 22.5.11. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. The notification must be made to the taxpayer by: 1) sending or presenting Letter 907(DO), and 2) sending or presenting Publication 1035 "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872.

Regardless of which method you use to notify the taxpayer, you should document your actions in this regard in the case file (Form 9984). See, IRM 121.2, Ch. 22.3. Although section 6501(c)(4)(B) does not provide a sanction or penalty on the Service for failure to comply with the notification requirement, a court might conclude that an extension of the statute of limitations is invalid if the Service did not properly notify the taxpayer. Thus, it is important to document your actions in this regard in the case file.


DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any questions, telephone Anna Kozoulina of our office at (212) 264-1595, ext. 291.

ROLAND BARRAL
Area Counsel - LMSB
(Financial Services, Area 1)

By:


THEODORE R. LEIGHTON

Associate Area Counsel (LMSB)